

COLE SCHOTZ P.C.

Jill B. Bienstock, Esq.
1325 Avenue of the Americas, 19th Floor
New York, NY 10019
(212) 752-8000
(212) 752-8393 Facsimile
Attorneys for Thermwell Products Co., Inc.
d/b/a Frost King

Hearing Date: TBD
Objection Deadline: TBD

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:	:	Chapter 11
	:	
	:	Case No. 18-23538 (RDD)
SEARS HOLDINGS CORPORATION, <i>et al.</i> ,	:	
	:	(Jointly Administered)
Debtors. ¹	:	
	:	

**MOTION OF THERMWELL PRODUCTS CO., INC. D/B/A FROST KING
FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM**

Thermwell Products Co., Inc. d/b/a Frost King (“Thermwell”) hereby files this motion (the “Motion”) for allowance of Frost King’s administrative expense claim, pursuant to 11 U.S.C. § 503(b)(1)(A), for services provided to or for the benefit of the Debtors on or after the

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); SR – Rover de Puerto Rico, LLC (f/k/a Sears, Roebuck de Puerto Rico, Inc.) (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors’ corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

Petition Date (defined herein). While Thermwell intends to timely submit a ballot in connection with the administrative claims consent program, Thermwell nonetheless files this Motion to preserve its claim. To the extent the Court determines to ultimately schedule this Motion for a hearing and consider it for entry of an Order, Thermwell requests that the Court enter an Order, substantially in the form attached hereto as Exhibit A (the “Proposed Order”). In support of this Motion, Thermwell respectfully states as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

2. The statutory predicates for the relief requested herein is in sections 105 and 503(a) and (b) of Title 11 of the United States Code (the “Bankruptcy Code”).

II. INTRODUCTION

3. Pre-petition and post-petition, Thermwell provided various weatherization products to one or more of the Debtors (defined herein) including to Kmart Corporation, Sears, Roebuck and Co. and Kmart Holding Corp.

4. Notwithstanding that Thermwell provided valuable products, which the Debtors subsequently sold (either to direct consumers or to the Debtors’ purchaser, Transform Co.), Thermwell was not ultimately paid for such goods. Accordingly, the within request is filed to preserve Thermwell’s administrative expense claim, while Thermwell simultaneously submits a ballot on the Debtors’ Administrative Expense Claims Consent Program.

5. Thermwell is aware that under the now confirmed Plan, all hearings for then pending administrative expense requests are adjourned until further notice. Accordingly, this

Motion is filed seeking allowance, though a hearing is not being requested at this time, unless and until the Court determines that a hearing can and should be scheduled on this Motion.

III. BACKGROUND

A. The Pre-Petition Services

6. Pre-petition, Thermwell shipped goods to one or more of the Debtors pursuant to purchase orders received.

7. Pre-petition, Thermwell shipped to one or more of the Debtors winterization products in the amount of \$14,862.16 for which Thermwell has still not been paid.

B. The Debtors' Bankruptcy Cases

8. On October 15, 2018 (the "Petition Date"), Sears Holding Corporation, together with various affiliates (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

9. The Debtors cases are being jointly administered. The Debtors continue in the management and operation of their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

10. In January 2019, the Debtors filed their respective Schedules of Assets and Liabilities. Thermwell was scheduled as having a general unsecured claim against each of Debtors Sears, Roebuck and Co. (in the amount of \$2,185.68) and Kmart Holding Corp. (in the amount of \$13,080.22).

11. On April 1, 2019, Thermwell filed a general unsecured claim against Debtor Kmart Holding Corp., assigned Claim No. 12583, in the amount of \$14,862.16, for pre-petition goods that it believed it shipped to Debtor Kmart Holding Corp., for which it was not paid. This is in addition to the goods shipped in the amount of \$2,185.68. The Schedule attached to as part

of Exhibit B reflects the pre-petition goods shipped (including the invoice numbers, purchase orders and invoiced amounts).²

12. Post-petition, in January 2019, the Debtors ordered weatherization products from Thermwell and Thermwell shipped to the Debtors a total of \$54,584.88 of such goods. As reflected in the chart attached as part of Exhibit B, payment for the January 2019 shipments were due on March 3, 2019, but ultimately were never made.

13. Pursuant to the now confirmed Modified Second Amended Joint Chapter 11 Plan of the Debtors [Docket Nos. 4476, 5370], all pending and subsequently filed administrative expense requests are adjourned until a date to be determined by the Debtors/the Liquidating Trust and the subject claimant, subject to the Court's availability, and such motions seeking allowance of administrative expense claims (already filed or subsequently filed) are to be treated as "proof of an Administrative Expense Claim." *See* Confirmation Order [Docket No. 5370], ¶ 51.

IV. BASES FOR ALLOWING OF ADMINISTRATIVE EXPENSE CLAIM

14. Section 503(b) of the Bankruptcy Code provides, in relevant part, that:

After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including— (1)(A) the actual, necessary costs and expenses of preserving the estate . . .

11 U.S.C. § 503(b)(1)(A).

15. The test to determine whether an applicant is entitled to payment of an administrative expense is whether the efforts of the applicant resulted in actual benefit to a debtor's estate. *See, e.g., In re CIS Corp.*, 142 B.R. 640, 642 (S.D.N.Y. 1992) (stating that

² Copies of the invoices and bills of lading for the post-petition supplied goods are available upon request to the undersigned counsel. Copies of the invoices are not included as they contain commercially sensitive information.

“[a]lthough [Section 503(b)(1)(A) does not fully define ‘necessary expenses,’ the phrase ‘including’ is not limiting” and citing 3 Collier on Bankruptcy ¶ 503.04[1] (15th ed. 1989) for the proposition that “administrative expenses can also include ‘costs of operating a business, for storage of property, for rent, for taxes and other costs incidental to protection and conservation’”).

16. After the Petition Date, Thermwell supplied goods to the Debtors which were either sold by the Debtors directly to their customers or the goods were sold to the Debtors’ purchaser, Transform Co., pursuant to a court-approved sale. In either case, a direct benefit was realized by the Debtors and their estates as a result of the goods Thermwell supplied to the Debtors. Thermwell is thus entitled to an administrative expense claim in the amount of \$54,584.88, pursuant to Section 503(b) of the Bankruptcy Code.

17. Pursuant to the Confirmation Order and the Plan, this Motion is to be treated as a proof of an administrative expense claim. *See* Confirmation Order, ¶ 51. Furthermore, considering the requirement that all hearings be adjourned until such time as a hearing is required, and scheduled at the convenience of the Liquidating Trust/Debtors, the claimant and the Court, Thermwell is not requesting a hearing be conducted on this Motion at this time.

V. RESERVATION OF RIGHTS

18. Thermwell reserves the right to amend this Motion, or any of the claims asserted in the Debtors’ cases, for any reason, including, without limitation, to the extent Thermwell learns: (i) of additional claims that it may have, (ii) that its claims are against a different debtor-entity, or (iii) that the nature of the claims is other than what Thermwell has already asserted. Nothing herein is intended to be nor should it be construed as a waiver of any of Thermwell’s rights or defenses.

VI. NOTICE AND NO PRIOR RELIEF REQUESTED

19. Notice of this Motion will be served on the Debtors, Transform Co. and the “Master Service List” as those terms are defined in the Amended Order Implementing Certain Notice and Case Management Procedures [Docket No. 405], and in the manner provided therein. Thermwell respectfully submits that no other or further notice need be provided.

20. No previous application or request was made to this or any other Court regarding the relief requested in this Motion.

VII. CONCLUSION

WHEREFORE, Thermwell respectfully requests that, to the extent the Court determines that a hearing may be scheduled and/or that the Court may enter an Order allowing the within Motion, that the Court enter an Order, substantially in the same form as that attached as Exhibit A, granting Thermwell an allowed administrative expense claim in the amount of \$54,584.88, pursuant to Section 503 of the Bankruptcy Code and providing for such other and further relief as it deems just and proper.

DATED: New York, New York
November 13, 2019

Respectfully submitted,

COLE, SCHOTZ P.C.,
Attorneys for Thermwell Products Co., Inc.
d/b/a Frost King

By: /s/ Jill B. Bienstock
Jill B. Bienstock, Esq.
1325 Avenue of the Americas, 19th Floor
New York, NY 10019
E-mail: jbienstock@coleschotz.com
(212) 752-8000
(201) 525-6328 Facsimile

EXHIBIT A

Proposed Order

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

	:	Chapter 11
In re:	:	
	:	Case No. 18-23538 (RDD)
SEARS HOLDINGS CORPORATION, <i>et al.</i> ,	:	
	:	(Jointly Administered)
Debtors. ³	:	
	:	

**ORDER GRANTING MOTION OF THERMWELL PRODUCTS CO., INC. D/B/A
FROST KING FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM**

Upon the Motion of Thermwell Products Co., Inc. d/b/a Frost King (“Thermwell”) for Allowance of Administrative Expense Claim and Reservation of Rights (the “Motion”); and the Court having jurisdiction to decide the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided; and such notice having been adequate under the circumstances; and it appearing that no other or further

³ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); SR – Rover de Puerto Rico, LLC (f/k/a Sears, Roebuck de Puerto Rico, Inc.) (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors’ corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

notice need be provided; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. Thermwell shall have an allowed administrative expense claim in the above-captioned cases pursuant to 11 U.S.C. § 503(b)(1)(A) in the amount of \$54,584.88 (the “Allowed Administrative Claim”).
3. Payment of the Allowed Administrative Claim shall be consistent with an Order of this Court on this Motion, the Confirmation Order, or such other Order of the Court.
4. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of this Order.

DATED: _____, 20__

White Plains, New York

THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

Schedule of Post-Petition Invoices

THERMWELL PRODUCTS CO., INC.

SEARS HOLDINGS /K MART

PRE-PETITION SUPPLIED GOODS (INCLUDED IN PROOF OF CLAIM ALREADY FILED) - K MART

Invoice Number	Reference Number	Customer PO Number	Invoice Date	Amount	Due Date
1075942	6066490	08275291655	07/10/2018	\$651.04	09/08/2018
1077001	6089520	08287236364	07/17/2018	\$847.40	09/15/2018
1077905	6089530	08305215866	07/24/2018	\$518.47	09/22/2018
1078951	6103060	08275296280	07/31/2018	\$671.39	09/29/2018
1078952	6103070	08289232251	07/31/2018	\$591.85	09/29/2018
1080042	6112260	08292254551	08/07/2018	\$507.29	10/06/2018
1080055	6125060	08287240529	08/07/2018	\$621.58	10/06/2018
1081417	6125050	08275298710	08/14/2018	\$851.22	10/13/2018
1082394	6141070	08287242648	08/21/2018	\$14.72	10/20/2018
1083309	6141050	08273669820	08/28/2018	\$65.58	10/27/2018
1083310	6141080	08292257997	08/28/2018	\$47.73	10/27/2018
1083868	6141060	08275300876	09/04/2018	\$7.80	11/03/2018
1083869	6141090	08305221886	09/04/2018	\$33.23	11/03/2018
1083878	6154150	08275302575	09/04/2018	\$1,268.79	11/03/2018
1086120	6174470	08275305150	09/18/2018	\$2,204.76	11/17/2018
1086121	6174480	08287246818	09/18/2018	\$949.21	11/17/2018
1087078	6182440	08275306192	09/25/2018	\$805.98	11/24/2018
1087079	6182450	08289241638	09/25/2018	\$1,111.75	11/24/2018
1087132	6192980	08287249339	09/25/2018	\$720.56	11/24/2018
1088083	6192970	08275307791	10/02/2018	\$1,117.57	12/01/2018
1088084	6192990	08292264564	10/02/2018	\$1,254.24	12/01/2018
TOTAL K MART PRE-PETITION CLAIM:				\$14,862.16	

PRE-PETITION SUPPLIED GOODS (INCLUDED IN DEBTORS' SCHEDULES) - SEARS

Invoice Number	Reference Number	Customer PO Number	Invoice Date	Amount	Due Date
1075939	6066050	546222	7/10/18	\$90.00	9/8/18
1075940	6066060	546223	7/10/18	\$235.56	9/8/18
1075941	6066080	546363	7/10/18	\$98.40	9/18/18
1081413	6124610	551239	8/14/18	\$131.40	10/13/18
1081414	6124620	551240	8/14/18	\$145.68	10/13/18
1081415	6124630	551345	8/14/19	\$10.08	10/13/18
1081416	6124640	551346	8/14/19	\$34.80	10/13/18
1084141	6154910	553983	9/5/18	\$633.36	11/4/18
1084142	6154920	554094	9/5/18	\$109.80	11/4/18
1084143	6154930	554095	9/5/18	\$436.08	11/4/18
1087076	6182080	557161	9/25/19	\$260.52	11/24/18
TOTAL SEARS PRE-PETITION CLAIM:				\$2,185.68	

POST-PETITION SUPPLIED GOODS - ADMINISTRATIVE EXPENSE CLAIM

Invoice Number	Reference Number	Customer PO Number	Invoice Date	Amount	Due Date
1097841	6309460	8275319663	12/26/2018	\$760.84	2/24/2019
1097842	6309480	8287261319	12/26/2018	\$2,728.72	2/24/2019
1098300	6309450	8275319662	1/2/2019	\$15,096.54	3/3/2019
1098304	6312550	8287262061	1/2/2019	\$987.88	3/3/2019
1098305	6312560	8292276701	1/2/2019	\$556.10	3/3/2019
1098361	6315860	8273693274	1/2/2019	\$778.54	3/3/2019
1098362	6315870	8275320955	1/2/2019	\$1,294.80	3/3/2019
1098363	6315880	8287262828	1/2/2019	\$1,490.92	3/3/2019
1098364	6315890	8289256435	1/2/2019	\$532.95	3/3/2019
1098560	6308870	8273691707	1/3/2019	\$3,141.27	3/4/2019
1098562	6309490	8289254959	1/3/2019	\$1,943.08	3/4/2019
1098563	6309500	8292276098	1/3/2019	\$3,003.32	3/4/2019
1098564	6309510	8305239866	1/3/2019	\$7,073.56	3/4/2019
1098802	6312530	8275320265	1/7/2019	\$2,731.00	3/8/2019
1098804	6313600	8289244439	1/7/2019	\$12,465.36	3/8/2019
TOTAL K MART POST-PETITION CLAIM:				\$54,584.88	